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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 687-688

UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION and UNITED NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, as owners of the Pilot Boat *Sandy Hook*, in their own behalf, etc.,

Libelants-Petitioners,

against

The Norwegian passenger Motor Ship *Oslofjord*, etc.,

and

DEN NORSKE AMERIKALINJE A/S (The Norwegian America Line), a Norwegian corporation, and owner of the motorship *Oslofjord*,

and

OIVIND LORENTZEN, as Director and Curator of Shipping of the Royal Norwegian Government, on behalf of The Royal Norwegian Government and of DEN NORSKE AMERIKALINJE A/S,

Respondents.

And Cross Suit.

PETITION FOR WRITS OF CERTIORARI.

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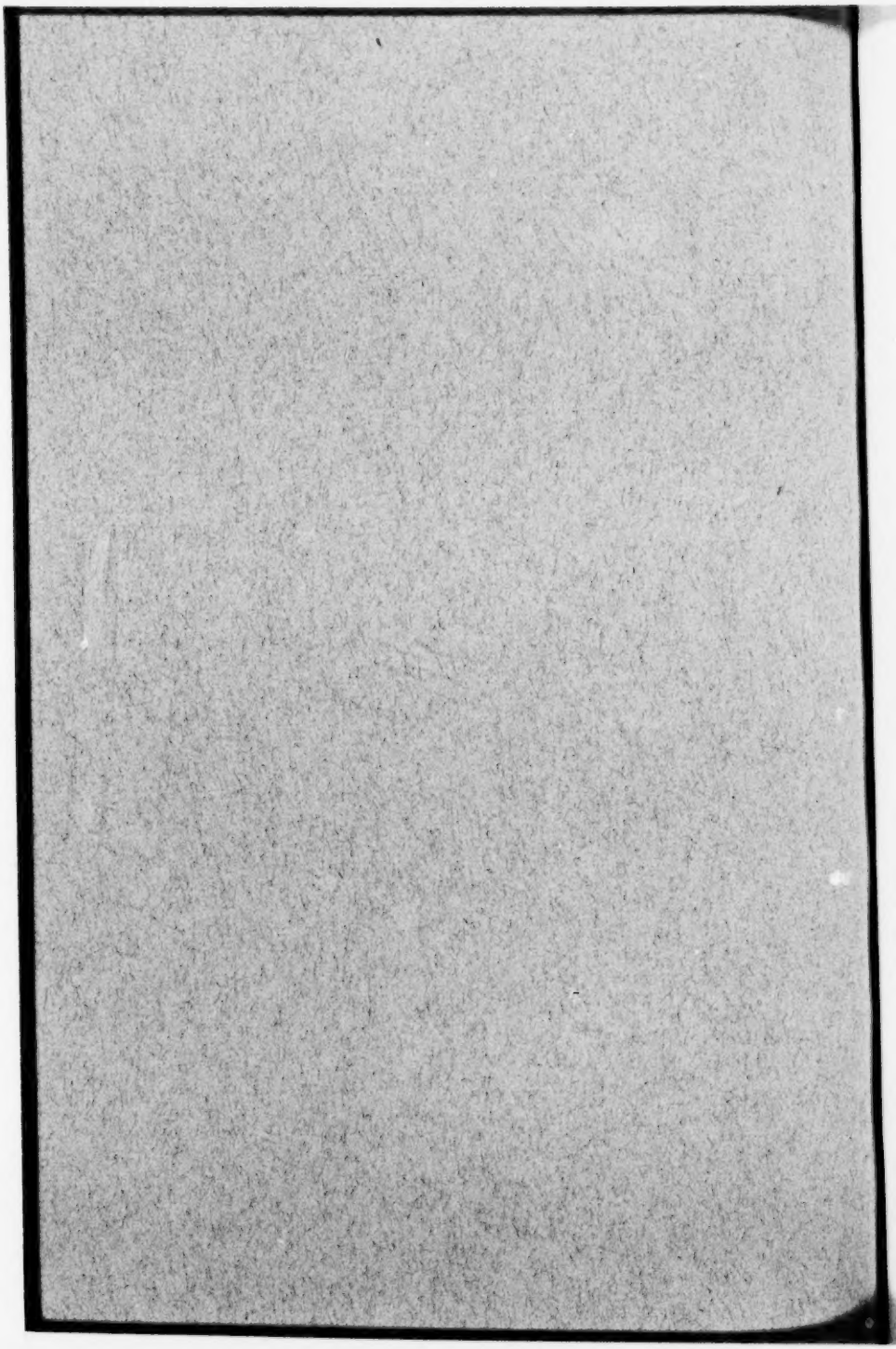

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Respondents.

And Cross Suit.

October Term, 1941, No.....

PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, United New York Sandy Hook Pilots Association and United New Jersey Sandy Hook Pilots

Association, as owners of the steam pilot boat *Sandy Hook*, pray that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Second Circuit, R. 378-380, entered July 12, 1941, affirming the decrees in Admiralty of the Southern District of New York, R, 346-348.

The opinion of the District Court is reported in 35 Fed. Supp. 150; and, the opinion of the Circuit Court of Appeals, dated June 19, 1941, is reported in 1941 A. M. C. 1150. R. 370-373.

The petitioners respectfully show unto this Court as follows:

Jurisdiction.

Jurisdiction of this Court is provided by §347(a) of Title 28 of the United States Code.

I.

Statement of Matters Involved.

(a) *The Circumstances.*

This litigation arose out of collision in an unusually dense fog, about a half mile South by East of Ambrose Light Vessel, marking the approach to New York Harbor, outside of the limits of Inland waters, on the morning of April 27, 1939, at 6.23½ a.m., between the steam pilot boat *Sandy Hook* and the Norwegian passenger and freight vessel, the *Oslofjord*, resulting in the sinking of the *Sandy Hook*, and in damage to the stem of the *Oslofjord*. Both vessels had been sounding fog signals for a considerable period before the collision. The *Sandy Hook*, in addition to the regulation fog signals, was also sounding the special pilot boat signal prescribed by the Rules. The pilot boat *Sandy Hook* after placing a pilot aboard an inbound steamer somewhat to the westward of Ambrose Light Ves-

sel, and having heard the fog signals of another vessel (the *Oslofjord*) approaching the harbor, on the pilot boat's port bow, started her engines "slow ahead", and proceeded on a South South Easterly course, in order to place a pilot on board the incoming vessel, the *Oslofjord*. The *Oslofjord*, westward bound, toward the southward of Ambrose Light Vessel, heard the pilot boat's fog signals, and special pilot boat signals, twenty (20) minutes or more prior to the collision, R. 162, 169, from the starboard bow (about 15° or less), R. 195-197, and thus well forward of the starboard beam of the *Oslofjord*. The *Oslofjord* continued ahead at a speed of admittedly eight (8) to nine (9) knots, R. 197; and, although she subsequently stopped her engines (6.10 a.m. to 6.19 a.m.) because of the close proximity of a tug and tow on her port side, she continued running her way off during this interval, and at the same time altered her course toward the direction from which the *Sandy Hook's* whistle signals were heard. The *Oslofjord* then started her engines ahead again, at 6.19 a.m., during which time the *Sandy Hook* was proceeding slowly outward to meet the *Oslofjord;* and, the *Oslofjord* continued her engines in ahead motion, until 6.22 a.m., only a minute and a half (1½) before collision occurred, when her engines were stopped, but her headway continued. Owing to the extreme density of the fog, the vessels did not sight each other until they were close aboard, the visibility being "not over 250 feet", R. 344, fols. 1030-31. Those in charge of the *Sandy Hook* endeavored to swing her bow away from the *Oslofjord* under a starboard helm, but this maneuver [*in extremis*] was unsuccessful, as the *Oslofjord*, although having belatedly reversed her engines at this time (6.23 a.m.), struck the port side of the *Sandy Hook* with considerable force, penetrating into the iron side and deck of the *Sandy Hook* to a depth of about eight (8) feet. Efforts were made to

beach the *Sandy Hook*, but they were unsuccessful, and she sank and became a total loss. R. 112-113.

The *Oslofjord* was admittedly moving ahead at a rate of speed of from one (1) to one and a half (1½) knots at the very moment of contact. R. 172, 341.

(b) *The Decisions Below.*

The *Sandy Hook* was held solely at fault by the District Court, affirmed by the Circuit Court of Appeals, on the ground that she altered course across the course of the *Oslofjord* without having ascertained the *Oslofjord's* course. R. 343.

The Circuit Court of Appeals viewed the situation as one in which the navigators of the *Sandy Hook* supposed that the *Oslofjord* had stopped; but, the testimony shows that those in charge of the *Sandy Hook* had heard the single blast signals of the *Oslofjord* [indicating that she had *not* stopped], after the assumed mistake in distinguishing the *Oslofjord's* signals, and that the *Sandy Hook's* navigation was not affected by that incident. R. 66-67, 108, 120. The Circuit Court of Appeals, in its written opinion and decision, stated, in reference to the *Sandy Hook's* continuing her approach to the *Oslofjord*: "*While this navigation was not indeed a fault*, nevertheless it must be judged as though she had known the facts." [Italics ours.] R. 370, fol. 371.

But, the Circuit Court of Appeals, having stated that: "the gravamen of the appeal is the *Oslofjord's* fault", R. 371, fol. 371, and that: "The *Sandy Hook* insists that she violated both commands of Article 16 of the International Rules", R. 371, fol. 372; proceeded to exonerate the *Oslofjord* as to these two charges, which, so we contend, constituted clear violations of the statutory mandates of Article 16 of the International Rules [and of the Inland

Rules], both with respect to failure to stop her engines on hearing the fog signal of another vessel forward of her beam, and for not navigating "with caution" thereafter.*

These petitioners seek a review of the lower Court's interpretation of the legal intendment of Article 16, therefore.

II.

Questions of law presented.

1. What is the meaning of the apparently controlling phrase in the statutory enactment embraced in the second paragraph of Article 16 of the International Rules (**footnote*), which reads: "The fog signal of a vessel, the position of which is not ascertained"?

2. Assuming that the vessel by which the fog signal is sounded is not in sight, what is meant by the word "position" in the said Rule, as to its ascertainment by the vessel hearing such a fog signal?

3. Does not the Rule make it compulsory on the moving vessel to "stop her engines" on hearing the fog signal of the obscured vessel, if there be any doubt whatever as to the "position" of the obscured vessel?

---

* Article 16, identical in both International and Inland Rules, reads as follows:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> "A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." [Act of Aug. 19, 1890, c. 802, §1; 26 Stat. 326.]

Confirmed and re-enacted by the "International Convention for Safety of Life at Sea, 1929", on May 31, 1929.

III.

Reasons for allowance of writs.

1. The decision of the Circuit Court of Appeals misinterprets and misapplies the statutory enactments of Congress governing navigation of vessels in fog, and, completely nullifies and subverts the intendment and the mandate of the statute, in that the moving vessel here, the *Oslofjord*, which admittedly violated the second paragraph of the aforequoted Article 16, was completely exonerated therefor.

2. The decision conflicts with the rulings of other Maritime Courts relating to navigation in fog, and is in direct conflict with the weight of authority on the subject.

3. The decision here leaves the important question of navigation of vessels with respect to each other in fog in uncertainty, if not in confusion; the paramount importance of the statutory enactment as expressed in the aforesaid quoted Rule, Article 16, fully justifies a review of this particular case by this Honorable Court.

IV.

Argument.

(a) *The requirements of the Rule (second paragraph, Article 16) are mandatory.*

The Rule was formulated as a result of extensive debate and careful consideration by the "International Marine Conference", which was assembled in Washington, D. C., in 1889. The Rule, as formulated by the Conference, was adopted by the Congress the following year.

The following extract from the Protocols of this Conference, as reported by the "Committee" having this subject under consideration, is here requoted, from Volume I, page 85, of the Protocol, to emphasize the intention of the framers of the Rule to make its requirements compulsory:

> "We consider it worthy the attention of the Conference whether the custom followed at present by careful seamen of slowing or stopping on hearing the fog signal of another ship not in sight, *unless certain of her bearing and distance*, could be made compulsory by a regulation so worded as not to relieve those in charge from full responsibility." (Italics ours.)

The italicized language above quoted clearly indicates that it was the intention to fix the "position" of the obscured vessel; that is, not only to the extent of ascertaining that the obscured vessel was "apparently forward of her beam", but that there should be a more definite and positive ascertainment of the other vessel's position, approaching a certainty, as to not only her "bearing" but her "distance".

(b) *The Oslofjord had not "ascertained" the "position" of the Sandy Hook within the meaning of the Rule, which Rule the Oslofjord admittedly disregarded.*

This is shown by the testimony of the master of the *Oslofjord* in answers to questions propounded by the Court:

> "By the Court:
>
> "Q. I understand that when you got to this point here, which is the intersection between this line showing your course and the bearing line, that then you heard some whistles from the pilot ship? A. Yes, we heard also Ambrose Lightship from 6:00

o'clock. I did not take the time exactly when we started to hear it.

"Q. Do I understand that all you mean in this discussion with Mr. McGrann is that the pilot ship appeared to be to the left of Ambrose Lightship? A. Yes.

"Q. You do not mean to say that it was not southerly of the lightship, or farther west of the lightship? A. No, you could not tell that". R. 195-196, fols. 585-586.

(c) *The Circuit Court of Appeals erred by wrongly interpreting the significance and importance of "ascertaining" the position of the Sandy Hook, as required by the Rule.*

The Court said in its opinion that the *Sandy Hook* was assumed to be in the vicinity of Ambrose Light Vessel, and concluded that: "The Rule imposes no duty of stopping the engines, unless the signal be from 'a vessel the position of which is not ascertained' ". R. 371-372. But, it could not have been known to the *Oslofjord* what course the *Sandy Hook* was pursuing, or later pursued; and, it could not have been known what distance separated the *Sandy Hook* and the *Oslofjord*, as both vessels were in dense fog.

This Court has heretofore recognized the difficulty, if not the impossibility, of determining the position of a vessel in fog with any degree of certainty. We requote the language of Mr. Justice Brown in the case of *The Umbria*, 166 U. S. 404, 408, referred to with approval by this Court in the case of *The Beaver-The Selja*, 243 U. S. 296:

> "It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance."

(d) *The Oslofjord's failure to comply with the Rule, by failing to stop her engines on hearing the Sandy Hook's signals, caused or contributed to the collision.*

It is obvious that a compliance with the Rule by the *Oslofjord* would have brought her into a position well clear of the *Sandy Hook* when the vessels finally came into sight of each other, by retarding her progress (and advance) ahead. The situation here is very similar to that in the case of *The Beaver-The Selja* (*Lie* vs. *San Francisco & Portland SS Co.*), decided by the Circuit Court of Appeals of the Ninth Circuit, 219 Fed. 134; and, affirmed by this Court, 243 U. S. 291. In that case, the "*Selja*", in fog, heard the fog whistle of the "*Beaver*" forward of the "*Selja's*" beam, sixteen (16) minutes before the collision; and, although the "*Selja*" reduced her speed considerably, she did not stop her engines on hearing the "*Beaver's*" fog whistle, as required by the Rule. Circuit Judge Ross, after finding that the "*Selja's*" engines were not stopped until ten (10) minutes after the first fog whistle of the "*Beaver*" had been heard, stated: "No amount of argument, no matter how ingenious and clever, can justify a court in ignoring the plain provisions of statute law." Page 137.

Mr. Justice Clarke, in delivering the opinion of this Court, affirming the decision of the Circuit Court of Appeals of the Ninth Circuit, intimated that it was immaterial whether or not the "*Selja*" had come to a standstill at collision, because, so he stated: "the evil had been done and the collision rendered inevitable", by failure of the "*Selja*" *to comply with the Rule.* 243 U. S. 298.

Moreover, the "*Oslofjord*" violated the Rule, apart from her failure to stop her engines, in that she did not "*navigate with caution until danger of collision is over*", but altered course and continued her headway into collision. *Ante,* pp. 3-4.

(e) *Having violated a statutory rule, it was incumbent upon the* Oslofjord *to show that the violation not only did not contribute, but could not have contributed, to the collision.*

That rule of evidence is firmly established: *The Pennsylvania*, 86 U. S. (19 Wall.) 125; *The Beaver-The Selja* (*Lie* vs. *San Francisco & Portland S. S. Co.*), 243 U. S. 291. The burden on the *Oslofjord* has certainly not been sustained in the present case.

Wherefore, these petitioners respectfully pray that writs of certiorari may be issued by this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, to the end that this probably most important of all statutory enactments governing the navigation of vessels with respect to each other, should be reviewed and clarified by this Honorable Court.

[A certified copy of the transcript of record of all proceedings in the District Court and the Circuit Court of Appeals is presented herewith.]

United New York Sandy Hook Pilots Association and United New Jersey Sandy Hook Pilots Association, Petitioners,

By W. H. McGrann,
Attorney.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Honorable Court, and that it is not filed for the purpose of delay.

W. H. McGrann.

New York, N. Y.,
October 6, 1941.

(20)

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Respondents.

And Cross Suit.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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BRIEF FOR RESPONDENTS

The respondents herein oppose the issuance of the writs of certiorari prayed for in the petition.

The opinion of the District Court is reported in 35 Fed. Supp. 150 and is printed at pages 338 to 345 of the record. The opinion of the Circuit Court of Appeals is reported in 121 F. (2d) 304 and is printed at pages 370 to 380 of the record.

I

Reasons for Denying the Writs of Certiorari.

(1) The case presents no question of general interest or importance. It involves an ordinary collision in fog, brought about by the negligent act of the Sandy Hook in changing her course and turning directly across the Oslofjord's bows. The only point raised by the petition is whether the Oslofjord violated the provision of Article 16 of the International Rules, to the effect that a vessel, hearing forward of her beam the fog whistle of another vessel whose position is not ascertained, shall stop her engines. The Circuit Court of Appeals (R. p. 372) found that the Oslofjord, when she heard the fog whistle of the Sandy Hook, actually knew the Sandy Hook's position and therefore was not obliged to stop her engines at that time. Both Courts below found that thereafter the Oslofjord navigated with caution, as required by the rule.

(2) The petition (p. 6) states that the decision of the Circuit Court of Appeals "conflicts with the rulings of other maritime courts relating to navigation in fog and is in direct conflict with the weight of authority on the subject". The petition cites no case which supports the foregoing statement.

(3) Even if the Oslofjord had been at fault in the respect alleged, that fault was so remote as not to constitute a cause contributing to the collision.

II

The Facts.

A few further facts regarding the collision should be stated.

1. The area in which the pilot-boat customarily meets incoming vessels is between the Ambrose Lightship and the Whistling Buoy or Sea Buoy, located about a mile further in towards the harbor (Bull p. 174, fol. 522; see chart, R. p. 320). It is very rare that the pilot-boat goes outside of the Lightship into the open ocean to meet a vessel. The officers of the Oslofjord testified that, in some hundreds of trips (Bull p. 159, fol. 476; Thorsen p. 216, fol. 648), they had never once known the pilot-boat to come outside the Lightship (p. 174, fol. 522; pp. 221, 222, fols. 663, 664). The Sandy Hook's witnesses could point to no instance in which the pilot-boat had done so, save a few exceptional cases, where incoming ships had signalled that they had anchored or stopped and were waiting outside (p. 61, fol. 181; p. 100, fol. 299; pp. 244, 245, fols. 732, 733). Accordingly, the Circuit Court of Appeals found (p. 370) that it is "by far the most common, though not the absolutely universal practice" for incoming vessels to meet the pilot-boat in the close vicinity of Ambrose Lightship and inside of it.

In accordance with this well understood practice, the Sandy Hook, on the same morning and before the collision, had put pilots on four incoming vessels close to and inside of the Lightship (Sullivan pp. 79-83, fols. 235-248; answers to interrogatories p. 27, fols. 80, 81; Sandy Hook logs pp. 30, 131). In the case of one other vessel which had arrived that morning, there was no available record of the position (p. 82, fol. 245; p. 27, fol. 80).

2. A vessel coming in from the east, as the Oslofjord was doing, is obliged to change her course gradually to

starboard as she approaches the Lightship, in order to round up towards it and to get on the proper course to proceed on up Ambrose Channel. This is obviously necessary, for otherwise the vessel would run by her destination and would eventually go ashore on the coast of New Jersey. The pilots desire incoming vessels to navigate in this manner, in order that they may be on a proper heading to go up the channel (Bull p. 166, fol. 497) and the pilots testified here that they expect vessels to make such an alteration of course, until they are lined up approximately for the channel, which runs 296° 54′ true (Sullivan pp. 86, 87, fols. 258, 259; Lowe p. 99, fol. 297; Goetz pp. 120, 121, fols. 360-362). The Oslofjord altered course in this way, little by little, between 6.10 A. M. and 6.19 A. M., until she was on a course of 296°, which is the equivalent of 297° by her gyro compass (Bull p. 165, fols. 493, 494; p. 166, fol. 497; p. 163, fol. 487).

The Oslofjord, therefore, pursued the usual course and that which the pilot-boat was bound to anticipate, and the Court below so found (Opinion p. 370).

3. The parties agree that the customary manoeuvre in putting a pilot aboard, is for the pilot-boat to round under the stern of the vessel and then to come alongside from aft, near enough to send the pilot aboard in a yawl (Halliday pp. 53, 58, fols. 157, 158, 173; Sullivan p. 65, fols. 193, 194; Lowe p. 99, fols. 296, 297).

4. After putting the pilots on board the five vessels already referred to, the Sandy Hook lay drifting in the vicinity of the Lightship (Sullivan p. 63, fol. 189). Her navigators had heard the Oslofjord's whistles approaching from the east and, as the Sandy Hook drifted, they heard what they mistakenly thought was a signal of two long whistles from the Oslofjord, indicating that she was lying motionless (Sullivan pp. 66, 84, 94, fols. 196, 250, 251, 281-283; Goetz pp. 107, 125, fols. 319, 373). It is now conceded, as was found by both Courts below (Opinions pp. 339, 370),

that the Oslofjord did not blow any such signal; but, under the erroneous impression that the Oslofjord was waiting outside, the pilot in charge of the Sandy Hook and her mate, after consultation between themselves (pp. 84, 107, fols. 250, 251, 319), decided to take the unusual course of running out to her, which they accordingly did. The Oslofjord was proceeding at dead slow on the correct course for the channel and was sounding fog whistles which the pilot-boat heard, and from which the pilot-boat knew that the Oslofjord was under way (Bull p. 167, fol. 500; Sullivan p. 95, fol. 284; Goetz pp. 108, 120, fols. 324, 360). Nevertheless, those on the Sandy Hook wrongly supposed that they were on the Oslofjord's port bow (Goetz pp. 122, 129, 130, fols. 364, 387, 388), though proper attention to her whistles would have shown the contrary. Without waiting to verify their position, without stopping their engines, and *before they had seen the Oslofjord at all,* they put their rudder right and then hard right, with the result that they swung the Sandy Hook directly in front of the Oslofjord (Goetz pp. 108, 122, fols. 324, 365, 366; Sullivan pp. 67, 70, 72, 90, 91, fols. 200, 208, 209, 214, 268-271).

This was not an error *in extremis,* as suggested in the petition, because (1) it was done, not under fear of imminent collision, but more than a minute before the collision (p. 343, fol. 1028) and simply because of a careless mistake in determining the Oslofjord's heading; and (2) a vessel cannot invoke the doctrine of error *in extremis,* if the emergency was wholly or partly her own fault (the *Dexter,* 23 Wall. 69, 76; the *Elizabeth Jones,* 112 U. S. 514; the *Protector,* 113 Fed. 868; the *Paris,* 37 F. [2d] 734, 740, aff'd 44 F. [2d] 1018).

The navigators of the pilot-boat did not see the Oslofjord until the pilot-boat had made her swing and was already across the Oslofjord's bow (Sullivan pp. 91, 93, fols. 272, 278; Goetz p. 123, fol. 368). They then tried to escape by going at full speed, but were unsuccessful (pp. 70, 72, 127, fols. 208, 214, 380).

The cause of the collision, therefore, was the negligent error of the Sandy Hook in turning directly in front of the Oslofjord, without having seen her and without having correctly appraised her position, and the Courts below so found (Opinions pp. 342, 343, 370, 371).

5. With regard to the Oslofjord's speed, both Courts below found that she was navigated with all due caution, and at speeds which were proper under the circumstances (Opinions pp. 344, 345, 371-373).

III

Argument.

A. The Circuit Court of Appeals did not misapply Article 16.

1. The Oslofjord, running at slow, had been hearing the Lightship's fog whistle since 4.20 A. M. (equivalent to 9.20 Greenwich mean time), and had been taking radio bearings of its direction (Exhibit L, pp. 165, 166, fols. 495, 496, reproduced opposite p. 20). At or shortly before 6 A. M., the distinctive whistle of the pilot-boat was heard, recognized and observed (Bull pp. 162, 169, 191, 192, 196, 197, fols. 486, 506, 571, 574, 588, 589; Thorsen p. 219, fol. 655). The position of the Lightship was, of course, known. The pilot-boat's position was ascertained to be *on the pilot-station, near the Lightship and a little to the westward (to the left) of it* (Bull pp. 191, 192-196, fols. 571, 574-586). She was still "far away" (p. 195, fol. 583). The actual distance works out as between two and three miles.

This position was correctly ascertained; for the pilot-boat's own evidence shows that at 5.50 A. M., she put a pilot on the Quirigua, well inside the Lightship "a little south of the line between Ambrose Lightship and the Whistling Buoy"; and at 6.05 A. M. she put a pilot on the Monarch of Bermuda in nearly the same place (pp. 27, 30, 36; see chart p. 320).

This corresponds with the Oslofjord's location of the Sandy Hook as being near the Lightship and (from the Oslofjord) a little to the left of it (Circuit Court of Appeals Opinion p. 372). That was her regular station.

The petitioner argues that Article 16 requires that the position be *exactly* and *precisely* ascertained. No case has ever so interpreted the rule and a moment's reflection will show the utter impracticability of any such interpretation. The rule presupposes that there is a fog, so that the other vessel cannot be seen. Obviously, if the rule meant that one vessel must stop until the *exact* position of the other vessel (in this case some miles away) was determined, then the approaching vessel would have to stop and wait until the fog cleared, because she could by no means ascertain the exact position until she could see the other vessel.

The meaning of the rule was clearly and sensibly defined in *Nippon Yusen Kaisha* v. *China Nav. Co.*, 1935 Appeal Cases 177, as follows:

> "In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation, she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision."

That is the law both of England and of common sense. There is no American case to the contrary.

Here was the Oslofjord approaching a familiar Lightship, where there was a recognized place of rendezvous with the pilot-boat. The Oslofjord was more than two miles off. She heard the signal of the pilot-boat, which was then ascertained, and correctly ascertained, to be at the usual place. Must the Oslofjord stop and wait two miles away because she could not tell just how many yards the pilot-boat was from the Lightship? It was clearly safe for her to proceed with caution, and both Courts below have found that in fact she used all due care in doing so.

It is further to be remembered that this was not the ordinary case of two navigating vessels which intended to pass each other, preferably at a considerable distance. On

the contrary, the object of the two vessels was to approach each other, in order to permit the pilot-boat to put a pilot on the Oslofjord. They were not seeking to avoid each other, but to approach closely enough for the purpose stated.

It may well be that the degree of exactness with which the other vessel's position must be ascertained may vary with the distance. If the fog whistle of a vessel is heard apparently only one hundred yards away, a very much greater accuracy in ascertaining her position is possible and is necessary for safety than if the whistle heard is several miles away. Here we are dealing with the latter situation. The whistle was upwards of two miles off and, moreover, it was recognized as the whistle of a pilot-boat known to be on a definite pilot-station.

2. The Oslofjord ran at slow until 5.45 A. M.; at dead slow until 6.02, when the fog lifted so as to give half to three-quarters of a mile of visibility; then at slow until 6.10, when the fog increased and the whistles of an approaching tow were heard (Bull pp. 162, 163, 188, 189, fols. 486, 487, 564, 565; Thorsen p. 217, fol. 649; Fiskerstrand pp. 297, 298, fols. 890, 891, 892). Then the Oslofjord stopped her engines and they remained stopped *for nine minutes* (Bull pp. 163, 164, fols. 487, 490; Thorsen p. 217, fol. 649). During this time, her headway fell off until she was almost at a standstill and her course was gradually changed from 269° true to 296° true,—the channel course, on which the pilots expected her to approach (Bull pp. 165, 167, 198, fols. 493, 494, 500, 592-594). She ascertained that the whistle of the pilot-boat was still close to the Lightship (as in fact it was), and that at 6.19 it bore 315° true from the Oslofjord (Bull p. 165, fol. 494; Thorsen p. 217, fol. 651). So, not only did she ascertain the position of the pilot-boat when she first heard it, but she stopped her engines, ran off nearly all her headway and ascertained it again when she got closer. Her speed at this time (6.19) was not more than 1 to 2 knots (Bull pp. 168, 189, 273, fols. 502, 565, 817;

Thorsen p. 217, fol. 650). Then, at 6.19, she started her engines at dead slow (Bull p. 167, fols. 500, 501) to reach the rendezvous. Thereafter, at about 6.20 (District Court Opinion p. 342) the Sandy Hook started to run outside the Lightship, under the mistaken impression that the Oslofjord was lying still to wait for her there. As she proceeded, she heard the Oslofjord's fog signals of one whistle and thereby she knew that the Oslofjord was moving, but she negligently misapprehended the Oslofjord's heading, although it was just what she was bound to anticipate, and she made the fatal mistake of turning across the Oslofjord's bows without reducing her speed and without knowing the Oslofjord's heading.

Up to 6.22, the Oslofjord, as she advanced, had been hearing the pilot-boat's whistle drawing aft on her starboard side,—an indication of safety (Bull pp. 169, 170, fols. 506-508). As soon as the sound of the whistles suggested that the pilot-boat might be coming outside of the Lightship, the Oslofjord stopped her engines, and reversed them when the pilot-boat's sudden change of course created danger of collision (Bull pp. 169-171, fols. 506, 511; Thorsen pp. 218, 219, fols. 654, 657). The Oslofjord's headway was all but off when the collision occurred, at about 6.24 (Bull pp. 171, 172, fols. 513, 514; Thorsen pp. 219, 227, fols. 657, 681).

All of this navigation was careful and prudent and all questions of fact as to its propriety have, it is submitted, been settled by the concurrent findings of the District Court and of the Circuit Court of Appeals.

It will be noted from the foregoing (1) that the Oslofjord knew the true position of the pilot-boat at the time when she first heard her whistles and that, therefore, she fulfilled the requirements of Article 16; (2) that thereafter she stopped her engines for a period of 9 minutes, 6.10 to 6.19, during which time she came almost to a standstill and she then again correctly checked the position of the pilot-boat. She did not violate Article 16 or any other rule of navigation.

B. The alleged fault was too remote to constitute a contributing cause of the collision.

Nothing that happened at or before 6 A. M. had the remotest connection with the collision at 6.24. The Oslofjord, as already noted, was nearly at a standstill at 6.19. She then put her engines at dead slow ahead for the purpose of approaching the pilot-boat, which was still drifting near the Lightship. This engine order, of course, increased her headway somewhat. From that point on, her speed was in obedience to that engine order. She was no longer running out the headway which she had previously had, but she had a new speed, based upon a new order. If that new speed had been too great (as both courts below found that it was not), her fault would have been at that point. Anything earlier is too remote from the collision to be legally relevant.

That is the distinction between this case and that of *Lie* v. *San Francisco & Portland SS. Co.*, 243 U. S. 291, on which the petitioners rely. In the *Lie* case, the vessel was guilty of a clear breach of Article 16 because, although she had not ascertained the position of the other vessel, she continued to operate her engines ahead for several minutes after she first heard the approaching whistle, and then stopped them and began to run out the headway which she had. She was still moving under that same headway at the time when the collision occurred. That fact was emphasized by this Court at page 298 of its opinion. The facts here are wholly different. The Oslofjord's headway was the result of the dead slow ahead order at 6.19 and had nothing whatever to do with the question of whether or not she stopped her engines at or before 6 A. M.

It is, of course, well settled that prior speed not contributing to the collision is immaterial.

In *The Ludvig Holberg*, 157 U. S. 60, 67, this Court said:

> "* * * She was clearly not bound to stop solely on account of the fog, and if she had been running dead slow for four or five minutes before the collision, she

cannot be held in fault for what her previous speed may have been. If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed."

In *Steffens* v. *United States*, 32 F. (2d) 206, 207, the Circuit Court of Appeals for the Second Circuit said:

> "The appellant charges her with fault for her earlier speed and in this we are in accord; but if the times recorded in the engine room are correct, it seems to us that it could not have contributed. Her slow speed signal was at 10.05 and the collision was at 10.19. A lapse of nearly a quarter of an hour must have run off the higher speed and made her dependent for her forward motion upon the power which the propeller continued to give."

IV

CONCLUSION

The present case is of the familiar type of collision in fog brought about by a negligent change of course by one of the vessels. It is submitted that it involves no important question of law. The Oslofjord was navigated with extraordinary caution. She ascertained the position of the pilot-boat when she first heard its whistle, and the Circuit Court of Appeals correctly held that, by so doing, she complied with the law and was not obliged to stop her engines to avoid collision with a pilot-boat which was on her known station upwards of two miles away.

The petition should be denied.

New York, N. Y., October 24, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 687 and 688.

UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION and UNITED NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, as owners of the Pilot Boat *Sandy Hook*, in their own behalf, etc.,

Libelants-Petitioners,

against

The Norwegian passenger Motor Ship *Oslofjord*, etc.,

and

DEN NORSKE AMERIKALINJE A/S (The Norwegian America Line), a Norwegian corporation, and owner of the motorship *Oslofjord,*

and

OIVIND LORENTZEN, as Director and Curator of Shipping of the Royal Norwegian Government, on behalf of The Royal Norwegian Government and of DEN NORSKE AMERIKALINJE A/S,

Respondents.

And Cross Suit.

REPLY BRIEF FOR THE PETITIONERS TO THE BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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ARGUMENT.

The object of this reply brief is primarily intended to direct the Court's attention to what is believed to be a mis-

interpretation of the English case cited by Respondents in their Brief in Opposition, namely, *Nippon Yusen Kaisha* vs. *China Nav. Co.*, 1935 Appeal Cases 177, page 7 of Respondents' Brief.

In that case, the Privy Council decided that the *Kiangsu* committed a breach of Article 16 of the International Rules, and was condemned therefor, page 183.

The circumstances there were that the *Kiangsu* heard the fog signal of the *Toyooka Maru* on the former's port bow and assumed that the latter was an outward bound vessel and would adhere to that side of the channel (south) opposite to the side which the *Kiangsu* was pursuing (north). However, the *Toyooka Maru* was crossing the channel.

As to the inference that the *Toyooka Maru* was on and would continue on the south side of the channel, the Court concluded that that was not an "ascertainment" of the position of that vessel sufficient to remove the *Kiangsu* from the operation of the Rule and its requirement that she should "stop her engines". The Court stated at page 182:

> "An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by Regulation 16. In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision: see, *e. g.*, per Sir Gorell Barnes P. in *The Aras*, 1907 Prob. 28, 34. *The Kiangsu did not know the position of the Toyooka Maru in this sense; she inferred it and took the chance of her inference being right.*" (Italics ours.)

Respondents rely on the above quoted language to establish a general rule [page 7 of Respondents' Brief in Opposition]; but, it is to be emphasized that the position of the vessel whose fog signal is heard, to repeat the extract from the foregoing quotation, must be known to be such "that both vessels can safely proceed without risk of collision."

It was conceded that the master of the *Oslofjord* did not "know" the position of the *Sandy Hook*, that is, whether the *Sandy Hook* was to the west or south of Ambrose Lightship. *Petition*, page 8. We contend that the navigators of the *Oslofjord* did not *know* that the *Sandy Hook* was in or would remain in a position near Ambrose Lightship, particularly as the pilotage grounds on which the *Sandy Hook* maneuvered were quite extensive, including waters well to the southward of Ambrose Lightship. It seems that a reasonable assumption or inference must be that the *Sandy Hook* would cruise outward, and to the southward, from Ambrose Lightship, and would thus be "crossing the channel" into which the *Oslofjord* directed her course.

As to the contention in Respondents' Brief that observance of the Rule would require the moving vessel (*Oslofjord*) to stop until the *Sandy Hook* would be sighted, that is not only not the contention of these Petitioners, but it does not by any means follow from observance of the Rule (Article 16), as all the Rule requires is that the moving vessel (*Oslofjord*) should "stop her engines, and then navigate with caution until danger of collision is over." *Petition*, page 5.

It is repeated that the *Oslofjord* not only violated the Rule with respect to stopping her engines on hearing the

Sandy Hook's fog whistle, but she did not thereafter navigate with caution. *Petition,* pages 3-4.

Respectfully submitted,

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New York, N. Y.,
October 28, 1941.